

D. Walker
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
100 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94111

March 14, 1973

Alan M. Goda
Deputy Attorney General
State of Hawaii
Hawaii State Capitol, 4th Floor
Honolulu, Hawaii 96813

Re: Review of Hawaii Law re: FWPCA,
as amended, and NPDES

Dear Mr. Goda:

My office has gone over the points raised in your letter of February 13, 1973, and are responding accordingly.

1. Re: public notification of each application:
You are correct in that Section 342-6(c) states "Director shall insure that the public receive notice of each application for a permit . . .". Reading further, the same section provides "He may hold a public hearing . . ." (emphasis ours).

As I pointed out to you when in Hawaii, the word "may" indicates that the holding of public hearing is exclusively discretionary with the director as opposed to "an opportunity for public hearing."

In addition, Section 124.32 of the State Program Elements Necessary for Participation in the NPDES (37 Federal Register 28394, December 22, 1972) are quite detailed regarding publication and contents of a public notice, of which Hawaii's proposed amendment made no mention, and which resulted in our finding authority lacking.

This should not be a major problem, however, as it would seem regulations could implement the proposed Section 342-6(c).

2. Re: second affected states:
You are correct; there are no second affected states material to Hawaii, therefore Hawaii's failure to include legislation relative thereto is moot.
3. Re: notice to interstate agencies:
You are correct regarding notice to interstate agencies since there are no other states in proximity to Hawaii.

However, Section 124.34(c) and 124.34(d) of 37 Federal Register 28394-28395 (December 22, 1972) are applicable and there was no provisions therefore in Hawaii's proposed legislation.

I believe this too could be handled by Regulation.

4. Re: availability of data to the public:
Your legislation 342-5 provides that reports submitted to the Department on discharge of waste shall be made available for inspection by the public . . . unless such reports contain information of a confidential nature concerning secret processes or methods of manufacture. (emphasis ours)

Section 402(b)(9) of FWPCA, as amended, requires State laws to provide industrial users of any publicly owned treatment works will comply with Section . . . 308.

Section 308(b) provides any records, reports or information obtained under this section . . . (2) shall be available to the public, except that upon a showing . . . that the information [other than effluent data] if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such . . . confidential . . .

We felt Hawaii's authority was questionable because.

1. Hawaii provides for public availability of only "Reports submitted on discharges of wastes." The requirements of Sec. 402(b)(9), via Sec. 308(b) is public availability of a broader range of materials.

Hawaii's statute does not seem to include public availability of Reports made by the Department but only those submitted to the Department.

2. Hawaii's definition of material that is not available to the public appears to be broader than is provided by Section 308(b).

3. Section 308(b) protects "effluent data" from being cloaked in confidentiality and Hawaii's statute does not contain this protection.

5. Re: reporting requirements - public availability
I believe the information in paragraph 4 above also explains this inquiry in your paragraph 5.

6. Re: enforcement provisions
Your Section 342-8 is effective only in case of alleged violations of the Act and not in the broader scope of EPA Regulation 124.73(b) i.e., "any imminent or substantial endangerments to the health or welfare of persons resulting from the discharge of pollutants.

Also, your Section 342-12 deals only with violations and not with the broader scope of EPA Regulation 124.73(b).

Your Section 342-9 authorizes action by the director, but subject to the delay, limitation and condition, that there be approval by the Governor.

7. Re: industrial discharge
Your Section 342-6 affects only permit holders and therefore does not apply to "sources" using municipal treatment works as provided in 402(h).

Your Section 342-9 deals only with situations of "imminent peril" but FWPCA Section 402(h) requires the states to have legislation to act any time a permit condition is violated.

Your Section 342-12 applies "to prevent any violation of this chapter" The authority contemplated by 402(h) is such as to stop industrial discharges to municipal treatment works not to stop the discharger (municipal treatment works).

Your Section 342-33 prohibits anyone engaging in activity causing state waters to become polluted.

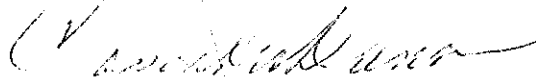
Sections 342-12 and 342-33 if read very broadly may be construed sufficient for FWPCA 406(h) purposes.

However, a defense argument could be made that industrial users' discharges are not causing the pollution; rather the treatment works are causing same.

It appears that most if not all of the inadequacies existing in Hawaii's legislation and proposed legislation can be met by rules and regulations.

If my office can be of further assistance, please let me know.

Sincerely,



CASSANDRA DUNN,
Regional Legal Counsel

cc: Paul DeFalco, Jr.
Regional Administrator

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